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## ACTMAR SDN BHD v. NORMAH SALIJAN & ANOTHER APPEAL

HIGH COURT MALAYA, SHAH ALAM
ALICE LOKE YEE CHING JC
[CIVIL APPEALS NO: BA-12BNCVC-77-10-2019
B & BA-12BNCVC-79-10-2019]
23 SEPTEMBER 2020

***CONTRACT:*** *Misrepresentation – Sale and purchase of car – Claim for damages – Purchaser discovered dissatisfactory conditions day after delivery of car –* C *Allegations that car not new but was showroom car – Whether there was evidence that purchaser given showroom car – Whether there was misrepresentation by seller that car was new – Whether purchaser established claim premised upon misrepresentation – Whether claim for damages substantiated*

D ***CONTRACT:*** *Agreement – Hire purchase agreement – Misrepresentation – Purchaser and bank entered into hire purchase agreement for purchase of car – Purchaser discovered dissatisfactory conditions day after delivery of car – Allegations that car not new but was showroom car – Purchaser informed bank to withhold balance of purchase price to seller but bank proceeded to release – Whether there was misrepresentation by bank to purchaser that car was new – Whether purchaser had* E *cause of action in misrepresentation against bank*

***CIVIL PROCEDURE:*** *Pleadings – Misrepresentation – Sale and purchase of car – Claim for damages – Purchaser discovered dissatisfactory conditions day after delivery of car – Allegations that car not new but showroom car – Claim allowed* F *on basis that purchaser succeeded in proving case as car was not new but manufactured in previous year – Whether decision based on pleaded case of purchaser – Whether claim allowed based on unpleaded facts – Whether there was appealable error*

One Normah had (i) made a booking for a Honda Accord 2.4VTL ('car') and G paid a deposit fee of RM800 towards the price of RM168,764.30; and (iii) applied for a loan for RM150,000 from Public Islamic Bank Bhd ('bank'), with her husband acting as the guarantor. Actmar Sdn Bhd ('Actmar') delivered the car to Normah and she signed the vehicle delivery order without any complaint or objection. However, after discovering dissatisfactory conditions of the car, Normah and her husband ('plaintiffs') H returned the car to Actmar. Meanwhile, the bank released the balance purchase price of the car to Actmar and the first plaintiff had been servicing the loan instalments since. The plaintiffs commenced an action at the Sessions Court, premised on misrepresentation, (i) against Actmar ('first defendant') on the grounds that (a) they were given not a new car but a I showroom car; (b) a new car, manufactured in 2017, ought to have been delivered to her; (c) the vehicle identification number ('VIN') of the car

showed that it was manufactured in 2016; and (d) the tyres installed in the car were made in weeks 36th and 43rd of 2016 and this was not disputed by the first defendant who offered to have the tyres changed; and (ii) against the bank ('second defendant') on the grounds that after returning the car to the first defendant's premises, they had informed the bank to withhold releasing the balance purchase price but the bank proceeded to release the same to the first defendant. The plaintiffs (i) claimed for general, exemplary and special damages and an amount of RM1 million was prayed for each of these heads of damages; (ii) in respect of special damages, prayed that, in the alternative, RM1,000 per day be paid as compensation for the loss of use of the car; and (iii) sought an order that the car be replaced with a new one. The first defendant applied to strike out the second plaintiff (Kamarolzaman), on the ground that he had no *locus* to initiate the suit, and the application was allowed. The first defendant submitted that (i) the car was not a showroom car; (ii) the vehicle ownership certificate ('VOC') showed that it was manufactured in 2017. All relevant information on the certificate, including the year or manufacture, was provided by the Honda manufacturer to the Road Transport Department ('RTD') at the time of registering the vehicle; and (iii) the following documents substantiated the first defendant's averment that the car was manufactured in 2017, namely (a) the hire purchase agreement ('HPA') entered into between the first plaintiff and the second defendant; (b) the Takaful insurance certificate taken out by the first plaintiff herself; and (c) the invoice from Honda Malaysia to the first defendant. As the car had been returned to the first defendant's premises, the first defendant filed a counterclaim for an order that the first plaintiff collect the car and for charges of RM100 per day be paid by her. The second defendant, too, denied that the car was not new and placed reliance on the same documentary evidence as the first defendant's. The second defendant further contended that, *inter alia*, (i) the first plaintiff had no cause of action against the second defendant; and (ii) the second defendant contacted the first defendant several times, as an attempt to resolve the complaints, and it was only upon confirmation by the first defendant that the car was new that the balance purchase price was paid to the latter as a fulfilment of its contractual obligation. Any refusal to release the purchase price would amount to a breach of the sale and purchase agreement ('SPA'). The second defendant issued a third party notice against the first defendant for indemnity and contribution in the event the court found in favour of the plaintiffs. At the conclusion of the trial, the Sessions Court Judge ('SCJ') held in favour of the plaintiffs and made the following findings and orders: (i) the plaintiffs succeeded in proving, on a balance of probabilities, that the car was not new but one that was manufactured in 2016; (ii) the first and second defendant to pay general damages of RM40,000 and RM10,000, respectively, to the first plaintiff; (iii) the SPA between the first plaintiff and the first defendant,

A and the HPA between the plaintiffs and the second defendant, be nullified; (iv) the deposit for the car be refunded by the first defendant to the first plaintiff; and (v) the second defendant to refund to the plaintiffs all instalment payments made under the HPA. The SCJ further dismissed the third party claim of the second defendant against the first defendant. Hence, the present
B appeals by the first and second defendant.

**Held (allowing appeals):**

**(1)** The first plaintiff bore the burden of proving her case. Having asserted that she was given a showroom car, it incumbent upon her to prove that
C fact and establish a case of misrepresentation. However, based on the totality of evidence, she failed to do so. The first plaintiff had no proven misrepresentation on the part of the first defendant. There was no evidence that she was given a showroom car. (paras 63 & 64)

**(2)** The SCJ allowed the plaintiffs' claim on a different basis *ie,* the plaintiffs
D succeeded in proving, on a balance of probabilities, that the car was not a new car but one manufactured in 2016. This was clearly a perverse decision since it was not the pleaded case of the plaintiffs; the pleaded case of the plaintiffs, as specifically averred in their statement of claim, was that they were delivered a showroom car instead of a new one. The
E SCJ had allowed the plaintiffs' claim on an unpleaded fact. (paras 48-50)

**(3)** The VIN, at best, merely established that the car was a 2016 model. It was not evidence to establish a showroom car as per the plaintiffs' pleaded case. There was ample evidence establishing the car to be new
F and manufactured in 2017. The VOC stated the year of manufacture as 2017. This information was supplied by the Honda manufacturer by uploading it on the e-hakmilik system of the RTD. It was not possible for the first defendant to alter the information and instead change the year from 2016 to 2017. The SCJ also ignored other contemporaneous
G documents, such as the HPA and the invoice for the car, evidencing that the car was new. (paras 53-55 & 57)

**(4)** Among the defects listed in the statement of claim was an old plastic cover on which had the date 15 February 2017 affixed. This piece of evidence contradicted the first plaintiff's own case that it was a 2016 car.
H The first plaintiff's evidence of an old car was also based on the tyres of the car which were made in the 36th and 43rd week of 2016. This evidence, by itself, did not establish the car to be a showroom car. This evidence, when viewed against other evidence establishing a 2017 car ought to be given little weight. (paras 61 & 62)

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**(5)** The relationship between the plaintiffs and the second defendant arose from the HPA. The cause of action against the second defendant suffered from lack of specificity. The main grouse of the plaintiffs were that the balance purchase price was released against their specific instructions. However, from the written submissions filed for the plaintiffs, their cause of action was also premised on misrepresentation. To sustain a cause of action in misrepresentation, the plaintiffs must prove that the second defendant misrepresented to them that the car they would be given was new. No evidence was adduced in this regard. No case of misrepresentation had been made out for the same reasons as in the case against the first defendant. (paras 65-68 & 74)

**(6)** The relationship between the parties arose from a triangular transaction. Whilst the HPA was between the first plaintiff and the second defendant, the second defendant being the owner under the agreement, came into ownership of the car from a contract of sale with the first defendant. In order to hire the car to the first plaintiff, the second defendant had to buy the car from the first defendant. The second defendant was, therefore, obliged to release the balance purchase price to the first defendant once the car was delivered to the first plaintiff. Otherwise, the second defendant ran the risk of being in breach of its contract of sale with the first defendant. (paras 76 & 79)

**(7)** The second plaintiff was only a guarantor for the hire purchase loan taken by the first plaintiff. To maintain a cause of action against the second defendant, he must plead facts to demonstrate he had a remedy against the second defendant. The instalments were still being paid. The guarantee had not been called upon. No loss as yet had been suffered by the second plaintiff. There were no facts pleaded by the second plaintiff to show his right to claim for the damages prayed for. In the circumstances, the second plaintiff did not have a cause of action against the second defendant. (paras 80-83)

**(8)** There were only two main reliefs sought by the plaintiffs; they wanted the car to be replaced with a new car and they sought to be compensated with damages. They had no intention to terminate the HPA and SPA entered into. However, the SCJ proceeded to make an order that the HPA and SPA entered into with the defendants be held void. In effect, the SCJ terminated the HPA and SPA entered into without the plaintiffs praying for such orders. The SCJ's orders were clearly contrary to the principle that the court would not grant reliefs not prayed for by the parties. There was also no evidence led to support the awards. The court could not, for the sake of awarding damages, pluck a figure from the air. There must be evidence to substantiate the amount awarded as damages. (paras 84-87 & 91)

**(9)** The counterclaim of the first defendant was partially allowed. The first plaintiff was to take possession of the car from the workshop of the first defendant. The first defendant's claim for a storage fee of RM100 per day was disallowed in the absence of evidence. The second defendant's third party claim against the first defendant was academic and dismissed. (paras 92 & 93)

**Case(s) referred to:**

*Bank Perusahaan Kecil & Sederhana Malaysia Bhd v. Iskandar Zulkarnain Zainal Abidin [2013] 1 LNS 308 CA* ***(refd)***

*Credit Corporation (Malaysia) Bhd v. KM Basheer Ahamed & Anor [1984] 1 LNS 109 FC* ***(refd)***

*Government Of Malaysia v. Lim Kit Siang & Another Case [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63 SC* ***(refd)***

*Hock Hua Bank Bhd v. Leong Yew Chin [1987] 1 CLJ 126; [1987] CLJ (Rep) 126 SC* ***(refd)***

*Hong Yik Trading v. Liziz Plantation Sdn Bhd [2017] 8 CLJ 491 FC* ***(refd)***

*Iftikar Ahmed Khan v. Perwira Affin Bank Bhd [2018] 1 CLJ 415 FC* ***(refd)***

*Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 CA* ***(refd)***

*Master Jaya Environmental Sdn Bhd v. Pentas Flora Sdn Bhd [2020] 2 CLJ 609 CA* ***(refd)***

*Mature Land Sdn Bhd v. Atlantic Plantation Sdn Bhd [2012] 1 LNS 961 CA* ***(refd)***

*Ong Siew Hwa v. UMW Toyota Motor Sdn Bhd [2018] 8 CLJ 145 FC* ***(refd)***

*S Quarry Sdn Bhd v. Desaru Development Corporation Sdn Bhd & Ors [2019] 1 LNS 93 CA* ***(refd)***

*Saiman Umar v. Lembaga Pertubuhan Peladang [2015] 9 CLJ 153 FC* ***(refd)***

*United Investment And Finance Ltd v. Walker & Anor [1966] 1 LNS 208 HC* ***(refd)***

*Wee Lian Construction Sdn Bhd v. Ingersoll-Jati Malaysia Sdn Bhd [2010] 4 CLJ 203 CA* ***(refd)***

**Legislation referred to:**

Courts of Judicature Act 1964, s. 29

*(Civil Appeal No: BA-12BNCVC-77-10-2019)*

*For the appellant - Sugandra Rao Naidu; M/s Rao & Co*

*For the respondent - Muhammad Syafiz Shahar; M/s Azreen Ardin Shah, Razif & Partners*

*(Civil Appeal No: BA-12BNCVC-79-10-2019)*

*For the appellant - Tan Hong Kait; M/s Sidek Teoh Wong & Dennis*

*For the 1st & 2nd respondents - Muhammad Syafiz Shahar; M/s Azreen Ardin Shah, Razif & Partners*

*For the 3rd respondent - Sugandra Rao Naidu; M/s Rao & Co*

*Reported by Najib Tamby*

## JUDGMENT

**Alice Loke Yee Ching JC:**

### Introduction

**[1]** There are two appeals before me which arose out of the suit filed by the plaintiffs in the Sessions Court against Actmar Sdn Bhd and Public Islamic Bank Bhd, the first and second defendants respectively.

**[2]** Both the defendants filed the following appeals:

(i) Appeal No. BA-12BNCVC-77-10-2019 ("Appeal No. 77") by the first defendant; and

(ii) Appeal No. BA-12BNCVC-79-10-2019 ("Appeal No. 79") by the second defendant.

**[3]** Both the appeals are to be together. For ease of reference, the parties will be referred to as they were cited in the court below.

### Facts Of The Case

**[4]** The background facts setting out the relationship between all the parties are these. The plaintiffs are both husband and wife. On 8 August 2017, the first plaintiff made a booking for a Honda Accord 2.4VTL of obsidian blue pearl colour. She also paid a deposit fee of RM800 towards the price of RM168,764.30.

**[5]** To finance the purchase of the car, the first plaintiff applied for a hire purchase loan from Public Islamic Bank Bhd, the second defendant. The loan amount of RM150,000 was approved on 24 August 2017. The second plaintiff stood as guarantor in the agreement.

**[6]** A month later, on 8 September 2017 at around 6pm, the first defendant delivered a Honda Accord 2.4VTL of obsidian blue pearl colour bearing registration number WTD 783 ("the said car") to the plaintiffs' house. Other pertinent details of the said car are:

(i) chassis no: PMHHCR264GD601048; and

(ii) engine no: K24W63980991.

**[7]** The first plaintiff signed the vehicle delivery order upon taking delivery of the said car. No complaint nor objection was made about the condition of said car then.

**[8]** The dispute between the parties arose the following day when the plaintiffs complained about the condition of the car. Their dissatisfaction with the car led to the plaintiffs returning the car to the first defendant's premises at around 7pm on 9 September 2017.

**[9]** The plaintiffs claimed that the physical condition as discovered by them supported their contention that it was not a new car, but a showroom car. They refused to take delivery of a showroom car which had been subjected to wide testing and inspection by potential customers.

**[10]** On 3 November 2017, the second defendant released the balance purchase price of the said car to the first defendant after due execution of the hire purchase agreement. The first plaintiff has been servicing the loan instalments since.

**The Plaintiffs' Case Against The First Defendant**

**[11]** The first plaintiff's case against the first defendant, founded on misrepresentation, was premised on only one fact. She was given a showroom car when a new one, manufactured in 2017, ought to have been delivered to her.

**[12]** Reliance was placed on the vehicle identification number ("VIN") of the said car to show that the car was manufactured in 2016. Information from the internet was referred to in the written submission of counsel of the plaintiff, to explain the significance of the VIN.

**[13]** According to the information downloaded from Wikipedia, the VIN of the said car is its chassis number, ie, PMHCR2640GD601048, which comprises of 17 alphanumeric. The VIN comprises of three sections, namely:

(i) world manufacturer identifier (WMI);

(ii) vehicle descriptor section (VDS); and

(iii) vehicle indicator section (VIS).

**[14]** The VIN for Honda cars is in line with the recommendation of the International Organisation for Standardization (ISO) 3779: 2009 and adopted by the Malaysian Standard (MS) ISO 3779: 2011.

**[15]** Presented graphically, the VIN for the said car and its corresponding sections would look like this:

VIN (said car) : [P M H] [C R 2 6 4 0] [G D 6 0 1 0 4 8]
↓ ↓ ↓
WMI VDS VIS

**[16]** The year of the manufacture of a Honda car is indicated by the first alphabet corresponding to the VIS. In this particular case, the first alphabet is G. According to MS ISO 3779: 2011, the alphabet G corresponds to 2016 as the year of manufacture. If the first alphabet for the VIS is H, then the vehicle would be manufactured in 2017.

**[17]** Based on the above, the plaintiffs contend that the said car was manufactured in 2016.

**[18]** Next, the plaintiffs claimed that the tyres installed on the said car were made in weeks of 36 and 43 of 2016. This was not disputed by the first defendant who offered to have the tyres changed.

**[19]** The next evidence plaintiffs relied on was the physical condition of the car upon further examination of the said car. Their numerous complaints of its condition have been particularised in para. 9(a) to (k) of the statement of claim.

**The Plaintiffs' Case Against The Second Defendant**

**[20]** The plaintiffs also pleaded misrepresentation against the second defendant. Subsequent to the return of said the car to the first defendant's premises, the plaintiffs informed the second defendant to withhold releasing the balance purchase price to the first defendant as the car had been returned and they did not have the use of the car.

**[21]** Notwithstanding their instructions, the balance purchase price of RM150,600 was paid to the first defendant on 3 November 2017.

**The Reliefs Sought By The Plaintiffs**

**[22]** Both the plaintiffs claimed damages arising from such misrepresentation. Their claim comprise of general damages, exemplary damages and special damages. An amount of RM1,000,000 was prayed for each of these heads of damages. In respect of special damages however, the plaintiffs prayed that in the alternative, RM1,000 per day be paid as compensation for the loss of use of a car.

**[23]** Apart from damages, the plaintiffs also sought for an order that the said car be replaced with a new car from the Honda factory in Malaysia.

**The First Defendant's Case**

**[24]** The first defendant applied to strike out the second plaintiff on the ground that latter had no *locus* to initiate the suit. The application was allowed, leaving the first defendant to defend itself against the suit by the first plaintiff only.

**[25]** The first defendant denied that the said car was a showroom car. Instead it contended that there is overwhelming evidence that the said car was new and was manufactured in 2017.

**[26]** The vehicle ownership certificate states the vehicle to be manufactured in 2017. All relevant information on the certificate including the year of manufacture, was provided by the Honda manufacturer to the Road Transport Department ("RTD") at the time of registering the vehicle

with the department. The only information the first defendant supplied was the registration date with the RTD. Therefore the year 2017 stated in the certificate is conclusive evidence of the year of manufacture.

**[27]** The first defendant led evidence on the registration process of a new car with the RTD. He informed the court of the information required to be provided to the RTD. The manufacturer of the vehicle will upload the information pertaining to year of manufacture to the online system of the RTD. Such information cannot be altered.

**[28]** To substantiate its contention that the first plaintiff's car bearing registration number WTD 783 was new, the first defendant also relied on other documents. These documents are the hire purchase agreement entered into between the first plaintiff and the second defendant, the Takaful insurance certificate taken out by the first plaintiff herself, and the invoice from Honda Malaysia to the first defendant stating the year of manufacture to be 2017.

**[29]** As the said car had been returned to the premises of the first defendant, the first defendant filed a counterclaim for an order that the first plaintiff collect the said car and storage charges of RM100 per day be paid by her.

**The Second Defendant's Case**

**[30]** Like the first defendant, the second defendant also denied the plaintiffs' allegation that the said car was not new. The second defendant also relied on the same documentary evidence as the first defendant's, to show it was a new car, manufactured in 2017.

**[31]** These documents are the tax invoice dated 19 May 2017 from Honda Malaysia, the vehicle ownership certificate confirming the vehicle was made in 2017, the insurance certificate stating the year of manufacture as 2017 and the warranty and service booklet providing warranty on the basis of new vehicle standards.

**[32]** The second defendant also contended that by cl. 5.2 of the hire purchase agreement, the first plaintiff (the hirer) bears the responsibility to conduct an inspection of the car. The clause precluded any warranty given by the second defendant (the owner) as to the description of the said car.

**[33]** As the second defendant was aware of the dissatisfaction of the plaintiffs about the said car after it was delivered, it made attempts to resolve their complaints. The second defendant contacted the first defendant on several occasions. It was only upon confirmation by the first defendant that the said car was new, that the balance purchase price was paid to the first defendant.

**[34]** The second defendant contends that the payment of the balance purchase price was made to fulfil its contractual obligation with the first defendant. This obligation arose out of a sale and purchase agreement whereby the second defendant takes over the ownership of the car for the purpose of the hire purchase agreement with the first plaintiff. Any refusal to release the purchase price would be tantamount to a breach of the sale and purchase agreement by the second defendant.

**[35]** As the first defendant had made a demand for the balance purchase price the second defendant had no alternative but to release the balance purchase price. The first plaintiff therefore has no cause of action against the second defendant on the release of the balance purchase price.

**[36]** In addition, the first plaintiff is not entitled to reject the said car by returning it to the first defendant. As the hire purchase agreement is valid and in force, the vehicle belongs to the second defendant, and if the first plaintiff wishes to terminate the agreement, the said car ought to be returned to the second defendant who is the owner under the hire purchase agreement.

**[37]** In respect of the second plaintiff, the second defendant contends that he does not have the necessary *locus* to pursue a claim. He was merely a guarantor for the hire purchase loan taken. However, unlike the first defendant, the second defendant did not file an application to strike out the second plaintiff, but chose to submit on the latter's *locus* at the close of the trial.

**[38]** The second defendant did however, issue a third party notice against the first defendant for indemnity and contribution in the event the court found in favour of the plaintiffs on the issue of misrepresentation.

**Decision Of The Sessions Court**

**[39]** At the conclusion of the trial, the Sessions Court Judge found the plaintiffs' case of misrepresentation proven against both defendants. He also found the plaintiffs to be entitled to damages for the loss of use of the said car and for the emotional and mental distress suffered.

**[40]** In addition, he found that the second defendant ought not to have released the balance purchase price against the instructions of the first plaintiff.

**[41]** He then made the following orders:

(i) the first defendant to pay general damages of RM40,000 to the first plaintiff;

(ii) the sale and purchase agreement between the first plaintiff and first defendant be nullified;

A (iii) the deposit for the car to be refunded by the first defendant to the first plaintiff;

(iv) the second defendant to pay the plaintiffs RM10,000 as general damages;

B (v) the hire purchase agreement between the plaintiffs and second defendant be nullified;

(vi) the second defendant to refund to the plaintiffs all instalment payments in respect of the hire purchase agreement entered into;

C (vii) interest at the rate of 5% on the general damages awarded to be paid from the date of filing of the writ of summons until realisation;

(viii) the third party claim of the second defendant against the first defendant be dismissed; and

D (ix) costs of RM12,000 and RM8,000 be paid by the first and second defendants respectively.

**The Parties In The Appeals**

**[42]** Consequent upon the decision of the Sessions Court, and for the sake of clarity, the parties in these appeals are:

E (iii) In Appeal No. 77, the appellant is the first defendant, and the first plaintiff the respondent; and

(iv) In Appeal No. 79, the appellant is the second defendant, and the respondents are the first and second plaintiffs, and the first defendant respectively. The appeal against the first defendant arose out of the

F dismissal of the second defendant's third party claim.

**When Appellate Interference Is Warranted**

**[43]** An appeal from a decision of a subordinate court shall be by way of a re-hearing (see s. 29 of the Courts of Judicature Act 1964).

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**[44]** The present case is an appeal after a full trial with witnesses. An appellate court will not, generally speaking, intervene and interfere unless the trial court is shown to be plainly wrong in arriving at its conclusion. Matters of finding of facts and legitimate exercise of discretion by the courts of original jurisdiction is also often not interfered with by the appellate

H courts. (See *Wee Lian Construction Sdn Bhd v. Ingersoll-Jati Malaysia Sdn Bhd* [2010] 4 CLJ 203; [2010] 3 MLJ 425; and *Master Jaya Environmental Sdn Bhd v. Pentas Flora Sdn Bhd* [2020] 2 CLJ 609; [2020] 2 MLJ 117).

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**[45]** However, appellate interference is warranted where the trial judge has made a decision which is plainly wrong. A decision is plainly wrong if it is one which no reasonable judge could have reached.

**[46]** The Court of Appeal in *S Quarry Sdn Bhd v. Desaru Development Corporation Sdn Bhd & Ors* [2019] 1 LNS 93; [2019] MLJU 99 laid down several instances when decisions are considered to be plainly wrong or perverse. Some of the instances where the trial judge's decision is perverse, are where he had:

(i) misdirected itself on the evidence;

(ii) failed to judicially appreciate the evidence;

(iii) failed to consider any material evidence;

(iv) acted on some irrelevant evidence as to render the decision wholly erroneous;

(v) made wrong inference from facts;

(vi) misapprehended the facts;

(vii) gave reasons which are wholly unsatisfactory or contradictory of each other.

(See also *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19; [2003] 2 MLJ 97).

**Decision Of This Court**

**[47]** Upon considering the entire evidence led, the pleaded case of the respective parties, as well as the final orders made by the Sessions Court, I am of the view that there are clearly appealable errors to reverse the decision of learned Sessions Court Judge.

*The Sessions Court Found For The Plaintiffs On An Unpleaded Case*

**[48]** The pleaded case of the plaintiffs, evident from the statement of claim, was that they were delivered a showroom car instead of a new one from the Honda factory. This specific averment appears in paras. 8, 9 and 10 of the statement of claim, the amended reply to the first and second defendants' defence, as well as the first plaintiff's witness statement.

**[49]** However, the Sessions Court Judge allowed the plaintiff's claim on a different basis. He held that the plaintiffs had succeeded in proving on a balance of probabilities, that the said car was not a new car, but one that was manufactured in 2016.

**[50]** This was clearly a perverse decision as it was not the pleaded case of the plaintiffs. The Sessions Court Judge allowed the plaintiffs' claim on an unpleaded fact. The claim of the first plaintiff can only succeed if she proves that she was given a showroom car instead of a new car. Here, the claim was allowed on the basis that a 2016 car was given.

**[51]** The Sessions Court accepted the submission of plaintiffs' counsel that the said car was manufactured in 2016. His submission was premised solely on information downloaded from the internet. Such information ought to be treated with caution, and not to be regarded as conclusive of the issue at hand.

**[52]** As such information pertains to a technical matter, at the very least, evidence ought to have been adduced by persons with knowledge of such matters. It is not a matter which the court can take judicial notice of.

**[53]** In any event the evidence on the VIN at best, merely goes to establish the said car as a 2016 model. It is not evidence to establish a showroom car. To reiterate, the plaintiffs' pleaded case was that the first plaintiff was given a showroom car.

**[54]** To accept the evidence on the VIN to find for the plaintiffs also offends the rule on pleadings. It is trite law that parties are bound by their pleadings. (See *Iftikar Ahmed Khan v. Perwira Affin Bank Bhd* [2018] 1 CLJ 415; and *Saiman Umar v. Lembaga Pertubuhan Peladang* [2015] 9 CLJ 153; [2015] 6 MLJ 492). A party cannot be allowed to adduce evidence on unpleaded facts, and any decision made on such facts is liable to be set aside.

*No Case Of Misrepresentation Made Out Against The First Defendant By The First Plaintiff*

**[55]** On the other hand, there was ample evidence establishing the said car to be new and manufactured in 2017. The vehicle ownership certificate states the year of manufacture as 2017. This information is supplied by the Honda manufacturer by uploading it in the e-hakmilik system of the RTD. It is not possible for the first defendant to alter the information and instead change the year from 2016 to 2017.

**[56]** The Sessions Court Judge made an obvious error when he found that the information as to year of manufacture was supplied by the first defendant. This clearly went against the evidence adduced.

**[57]** The Sessions Court Judge also appeared to have ignored other contemporaneous documents evidencing the said car to be new. The hire purchase agreement stated the car to be financed was a new car. The invoice for the said car issued by Honda Malaysia was dated 19 May 2017.

**[58]** Apart from the VIN evidence, the first plaintiff also relied on alleged defects to prove it was not a new car. These defects were not raised until the next day after delivery of the car, and the vehicle delivery order signed. Signing the vehicle delivery order would indicate acceptance of the said car by the first plaintiff after finding it to be satisfactory.

**[59]** Further, there were no objections raised at the time of delivery. There was even a photograph taken of the second plaintiff with the car showing him giving a thumbs up. This photograph was tendered in evidence.

**[60]** In any event, the alleged defects, are defects which are easily noticeable. If the defects exist, the first plaintiff would have discovered it when the car was delivered. The first plaintiff in her oral evidence admitted having checked the car before taking delivery. If in fact there were such obvious defects, any prudent purchaser would have refused to accept delivery. The first plaintiff did not reject the said car, but proceeded to sign the vehicle delivery order.

**[61]** Among the defects listed in the statement of claim was an old plastic cover on which had the date 15 February 2017, affixed during the night shift production line 521 at site 069301. This piece of evidence contradicted the first plaintiff's own case that it was a 2016 car.

**[62]** The first plaintiff's evidence of an old car was also based on the tyres of the said car which were made in the 36th and 43rd week of 2016. This evidence, by itself, does not establish the said car to be a showroom car. This evidence when viewed against other evidence establishing a 2017 car ought to be given little weight.

**[63]** It is trite law that the first plaintiff bears the burden of proving her case. Having asserted that she was given a showroom car, it was incumbent on her to prove that fact, and establish a case of misrepresentation. (See *Hong Yik Trading v. Liziz Plantation Sdn Bhd* [2017] 8 CLJ 491; [2017] 5 MLJ 398).

**[64]** Based on the totality of the evidence adduced, I find that she has failed to do so. The first plaintiff has not proven misrepresentation on the part of the first defendant. There is no evidence she was given a showroom car. Even if her claim was on the basis she was given a 2016 car, the version of the first defendant that the said car was manufactured in 2017 was more probable, from the evidence adduced.

*Both Plaintiffs Have No Cause Of Action Against The Second Defendant*

**[65]** The cause of action against the second defendant, from the statement of claim, suffers from lack of specificity. The facts pleaded against the second defendant are contained in paras. 13 to 16 of the statement of claim. It would appear that the main grouse of the plaintiffs are that the balance purchase price was released against their specific instructions.

**[66]** However, from the written submissions filed for the plaintiffs, their cause of action, is also premised on misrepresentation. I will deal with the issue of misrepresentation first.

**[67]** To sustain a cause of action in misrepresentation, the plaintiffs must prove that the second defendant misrepresented to them the car they would be given is new. No evidence whatsoever was adduced in this regard.

**[68]** The relationship between the plaintiffs and the second defendant arises from a hire purchase agreement. It is within the four walls of the agreement that the relationship has to be examined.

**[69]** The second defendant relied on cl. 5.2 of the hire purchase agreement. The said clause provides that "where the goods are new and described as such in Part II of the Schedule hereto, the Hirer hereby confirms that he has examined the Goods prior to the date hereof and as regards defects which such examination ought to have revealed, the Goods are of merchantable quality. The Owner gives no warranty whatsoever in respect of the Goods as to description, fitness, roadworthiness (in the case of a motor vehicle), repair or otherwise ...".

**[70]** By the very terms of the hire purchase agreement entered into, the parties have agreed to exclude any warranty on the part of the second defendant as to the description and condition of said car.

**[71]** The practice of excluding implied warranties in similar transactions was recognised in the Federal Court in *Credit Corporation (Malaysia) Bhd. v. KM Basheer Ahamed & Anor* [1984] 1 LNS 109; [1985] 1 MLJ 208, where the court had this to say:

> At common law, it is usual to exclude the lessor from contractual liability arising from the implied terms as to fitness and quality. This is because the equipment is selected from the manufacturer or distributor by the lessee who requests the lessor to buy it and then lease it to him. The lessee takes on the responsibility of checking the condition of the equipment at the time of delivery and normally accepts it on the lessor's behalf. The lessor gives no warranty to the lessee as to the fitness of the equipment, but where there is no direct contractual arrangement between the lessee and the supplier, there is normally provision in the lease for action to be taken by the lessor on the lessee's behalf against the supplier. (See *Leasing* by T.M. Clark, pages 72, 83 & 84).This is required because since the lessor is the buyer and the legal owner of the goods, he has privity of contract with the manufacturer or supplier. Under the Sale of Goods (Malay States) Ordinance (No. 1 of 1957), there is an implied warranty or condition as to quality and fitness of goods supplied under certain contracts of sale. There is also an implied condition that the goods shall correspond with the description. (See sections 15 and 16).•

**[72]** In *Bank Perusahaan Kecil & Sederhana Malaysia Bhd v. Iskandar Zulkarnain Zainal Abidin* [2013] 1 LNS 308, the hirer sued the finance company for misrepresentation when the machines, the subject matter of the hire purchase agreement, was found to perform poorly. The Court of Appeal held:

> In a typical hire purchase arrangement, the finance company such as the appellant only provides finance. Save in circumstances where the finance company and the supplier of the goods are related companies, and this is not one such case, the finance company's knowledge of the supplier and the goods forming the subject matter of the sale and purchase agreement between the hirer and the supplier is likely to be only such information as is provided by the hirer ...
>
> The second characteristic of the typical hire purchase agreement is that consistent with a finance company's lack of knowledge of the particulars of the business pursued by a hirer and of the machines sought to be purchased by the hirer, the standard hire purchase agreement invariably incorporates covenants on the part of the hirer that it and it alone has knowledge of the items forming the subject matter of the hire purchase agreement and that the finance company as owner disavows any responsibility for representations as regards the merchantability, condition, quality, durability, or suitability of the said machinery/equipment ...

**[73]** Thus, our Malaysian courts have held such exclusionary terms to be effective against a claim in misrepresentation as to merchantability of goods supplied under a hire purchase agreement.

**[74]** However, for the sake of completeness, I will add that no case of misrepresentation has been made out for the same reasons as in the case against the first defendant.

**[75]** The plaintiffs also claim that the balance purchase price was released to the first defendant against their instructions. As a result, the first plaintiff was deprived of the use of a car even though she had to service the instalment payments.

**[76]** The relationship between the parties in this case arises in fact, from a triangular transaction. Whilst the hire purchase agreement is between the first plaintiff and the second defendant, the second defendant being the owner under the said agreement, comes into ownership of the said car from a contract of sale with the first defendant.

**[77]** This position was succinctly expressed in *United Investment And Finance Ltd v. Walker & Anor* [1966] 1 LNS 208; [1967] 1 MLJ 30 by AV Winslow J as follows:

> In the case before me all the requirements followed by the commercial community in matters of hire-purchase have been followed save that there is no formal agreement in writing evidencing a sale from the dealer to the financier. It would appear from *Goode on Hire-Purchase Law and Practice* at page 376 that the sale to the financier is usually subject to the provisions of a master agreement between the financier and the dealer regulating the business connection between them. It does not seem that such an agreement is essential though it would seem to be highly desirable. It is a separate contract from the hire-purchase agreement and regulates the business relationship between dealer and financier at its inception.

**[78]** In the recent Federal Court case of *Ong Siew Hwa v. UMW Toyota Motor Sdn Bhd* [2018] 8 CLJ 145; [2018] 5 MLJ 281, this position was re-affirmed. Whilst the substantive issue in question was the liability of the dealer *viz a viz* the hirer, the position of the financier/owner and the dealer was also discussed. The relevant passages are reproduced as follows:

> [47] Applying *Ahmad Ismail*, with the execution of the hire purchase agreement (P5), there is no contract of sale or an agreement to sell as defined in s. 4 of the SGA between the first defendant and the plaintiff. The first defendant did not transfer or agree to transfer the property in the said car to the Plaintiff. Indeed, given the hire purchase transaction in this case, the car was sold by the first defendant to the second defendant pursuant to which the property in the car passed to the latter, making it the owner of the car, enabling it to hire it out to the plaintiff ...
>
> [48] Reference may be made to *Drury v. Victor Buckland, Ltd* [1941] 1 All ER 269 ...
>
> ... In his judgment, Scott LJ said at p. 272: ... It was a sale by the Buckland company to the hire-purchase company. The property passed to them on the terms that they would get paid by the hire-purchase company, as no doubt they were in fact.

**[79]** In order to hire the car to the first plaintiff, the second defendant had to buy the car from the first defendant. The second defendant is therefore obliged to release the balance purchase price to the first defendant once the said car is delivered to the first plaintiff. Otherwise, the second defendant runs the risk of being in breach of its contract of sale with the first defendant.

*The Second Plaintiff Has No Cause Of Action Against The Second Defendant*

**[80]** The second plaintiff is only a guarantor for the hire purchase loan taken by the first plaintiff. To maintain a cause of action against the second defendant, he must plead facts to demonstrate he has a remedy against the second defendant. If he does not, then he fails to establish a cause of action against the second defendant. (See *Hock Hua Bank Bhd v. Leong Yew Chin* [1987] 1 CLJ 126; [1987] CLJ (Rep) 126; [1987] 1 MLJ 230; and *Government Of Malaysia v. Lim Kit Siang & Another Case* [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63).

**[81]** The instalments are still being paid. The guarantee has not been called upon. No loss as yet, has been suffered by the second plaintiff. The second plaintiff pleads that as a guarantor, he may be blacklisted in the CCRIS record. It is speculative at this stage.

**[82]** There are no facts pleaded by the second plaintiff to show his right to claim for the damages prayed for. In the circumstances, the second plaintiff therefore does not have a cause of action against the second defendant.

**[83]** The decision of the learned Sessions Court Judge to allow the claim of the second plaintiff against the second defendant was clearly wrong.

*The Reliefs Were Incorrectly Granted*

**[84]** The Sessions Court granted the claim of the first plaintiff against the first defendant and both the plaintiffs' claim against the second defendant.

**[85]** There were only two main reliefs sought by the plaintiffs. They wanted the said car to be replaced with a new car. In addition, they sought to be compensated with damages. They had no intention to terminate both the agreements entered to. It was obvious that they wanted to proceed with the agreement to purchase the car and the hire purchase agreement. Had they intended otherwise, they ought to have amended the reliefs in the statement of claim.

**[86]** Nevertheless, the Sessions Judge proceeded to make an order that both the agreements entered into with the defendants be held void. The deposit for the car had to be returned by the first defendant and all instalments towards the loan to be refunded by the second defendant. In effect, the court terminated the agreements entered into without the plaintiffs praying for such orders.

**[87]** His orders were clearly contrary to the principle that the court will not grant reliefs not prayed for by the parties. In *Mature Land Sdn Bhd v. Atlantic Plantation Sdn Bhd* [2012] 1 LNS 961; [2013] 4 MLJ 565 the Court of Appeal had this to say:

> [17] It will be timely to note at this juncture that the respondent's main claim was for the specific performance of delivery of vacant possession of the said portion of land alleged to be illegally occupied. There was no claim based on a rescission or termination of the SPA and particularly, there was no plea made by the respondent for a refund of the value of the said portion of land at RM565,686.44 or that upon a refund of the said sum by the appellant, ownership of the said portion of land (51.37 acres) shall revert to the appellant. It is trite that the court cannot entertain or grant any relief not prayed for by the respondent. Accordingly, in *Superintendent of Lands and Surveys Department Bintulu Division & Anor v. Agi ak Bungkong & Ors* [2012] 1 MLJ 335, where the trial

court went beyond what was claimed in the statement of claim, His Lordship Abu Samah JCA held, in delivering the judgment of the Court of Appeal, that such judgment is contrary to pleading, untenable in law and liable to be set aside. Further, in the recent case of *Kuan Pek Seng @ Alan Kuan v. Robert Doran & Ors and Other Appeals* [2013] 2 MLJ 174, His Lordship Jeffrey Tan FCJ delivering the judgment of the Court of Appeal held that the relief claimed must surface from the pleaded facts that is, 'there must be an inner connection, a legal nexus, between the facts relied on and the relief or remedy claimed'. It was also held by Buttrose J in *Seven Seas Supply Co v. Rajoo* [1966] 1 MLJ 71 that 'it is a well established principle of law that a case must be decided on issues raised by the pleadings which bind the parties. If other issues are desired to be raised or come to light during the trial they must be pleaded by way of amendment.

**[88]** The first plaintiff prayed for said car to be substituted with a new car. This prayer clearly shows she wanted to proceed with the agreement with the first defendant. There was no intention to terminate the agreement to buy the said car.

**[89]** In respect of the second defendant, the first plaintiff's conduct of returning the car to the first defendant and not the second defendant also shows she had no intention of terminating her agreement with the second defendant. Had she intended so, she would have surrendered the car to the second defendant who is the owner under the hire purchase agreement.

**[90]** The Sessions Court Judge's orders were not warranted in the circumstances of the case.

**[91]** The Sessions Court Judge further ordered general damages of RM40,000 and RM10,000 against the first and second defendants respectively. There was no evidence led to support this award. The court cannot, for the sake of awarding damages, pluck a figure from the air to make an award of damages. There must be evidence to substantiate the amount awarded as damages.

**Conclusion**

**[92]** Appeal No. 77 is allowed in that the claim by the first plaintiff for misrepresentation against the first defendant fails. The counterclaim of the first defendant against the first plaintiff is allowed partially. Only prayer (a) of the counterclaim is allowed. The first plaintiff is to take possession of the car from the workshop of the first defendant. The claim in prayer (b) for a storage fee of RM100 per day is disallowed in the absence of evidence.

**[93]** Appeal No. 79 by the second defendant is allowed in that the plaintiffs' claim against the second defendant is dismissed. However, in view of the dismissal of the plaintiffs' claim, the second defendant's claim against the first defendant *vide* the third party notice is now rendered academic, and thereby dismissed.

**Orders On Costs**

**[94]** With regard to costs, counsel for the plaintiffs submitted that costs of RM15,000 and RM12,000 for both the trial in the Sessions Court and appeal before me is a fair award. I agree with the proposal and order accordingly. No costs is to be awarded against the second defendant for the dismissal of its third party notice against the first defendant.